UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Polar Corp., Plaintiff, v. PepsiCo, Inc. and The Concentrate Manufacturing Company of Ireland, Defendants.	)	C.A. No. ____________

MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff Polar Corp. ("Polar") moves this Court for issuance of a Preliminary Injunction pursuant to Fed. R. Civ. P. 65 and the Lanham Act, 15 U.S.C. §§ 1051 et seq., enjoining defendants PepsiCo, Inc. and The Concentrate Manufacturing Company of Ireland from using the trademark POLAR in their POLAR SHOCK products, advertisements and promotional materials, internet websites, domains or other products or materials.

In further support of this Motion for a Preliminary Injunction, Polar submits the accompanying Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction.

Respectfully submitted,

POLAR CORP.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiff Polar Corp. ("Polar") has moved this Court for issuance of a Preliminary Injunction pursuant to Fed.R.Civ.P. 65 and the Lanham Act, 15 U.S.C. §§ 1051 et seq., enjoining defendants PepsiCo, Inc. and The Concentrate Manufacturing Company of Ireland (collectively, "PepsiCo" or "Defendants") from using the trademark POLAR in their POLAR SHOCK products, advertisements and promotional materials, internet websites, domains or other products or materials.

II. PRELIMINARY STATEMENT

Based in Worcester, Massachusetts, Polar has owned the trademark POLAR for over 100 years. Indeed, Polar owns the incontestable federal registered trademark POLAR for three separate POLAR marks, has owned and consistently used the trademark POLAR since at least 1902, and is also the owner of United States state trademark registrations in the states of Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia and West Virginia for the term POLAR covering soft drinks and carbonated beverages. Polar is well-known throughout these regions for providing high quality, healthy seltzer waters, other carbonated beverages, fruit juice blends, iced teas and waters.

Polar's claims arise out of PepsiCo's subsequent, intentional and unauthorized use of the confusingly similar POLAR SHOCK mark as part of its trademark and trade name in connection with competitive slush-type beverages. PepsiCo's branded Mountain Dew SHOCK products confirm the consumer impression PepsiCo is trying to create by combining a famous brand with the word "SHOCK." The positioning of the term POLAR as the first term in the POLAR SHOCK family of marks is identical to the positioning of MOUNTAIN DEW / MTN DEW first in the MOUNTAIN DEW BLUE SHOCK marks. The Defendants' use of POLAR in this manner is thus deliberately and willfully infringing Polar's rights in its POLAR mark and is highly likely to be confusing to consumers as to the source of Defendants' "SHOCK" products. PepsiCo is of course free to do this with Mountain Dew SHOCK or certainly Pepsi SHOCK because PepsiCo owns those famous brands. However, PepsiCo cannot misappropriate the famous Polar brand for POLAR SHOCK.

Through its wholly-owned subsidiary The Concentrate Manufacturing Company of Ireland, PepsiCo has applied for federal registration for a total of ten marks all displaying the POLAR SHOCK mark. Moreover, despite actual knowledge of Polar's trademark rights and interests, Defendants – since the late fall of 2010 – have begun to sell and promote these infringing products in select stores and fountain services in Massachusetts and other venues. The PepsiCo Defendants are therefore wrongfully, willfully and deliberately using the POLAR trademark without permission from Plaintiff in connection with their "SHOCK" products in violation of Plaintiff's long-established trademark rights in the POLAR trademark.

The favorable goodwill that Polar has developed in its POLAR mark over the past 100 years is at risk as a result of PepsiCo's use of the confusingly similar POLAR SHOCK family of marks. Defendants' use of POLAR SHOCK, if permitted, will lessen the capacity of Polar's trademark POLAR to identify and distinguish Polar's products, thereby causing harm to Polar. Moreover, Polar has suffered and will continue to suffer irreparable harm as a result of Defendants' use of the POLAR SHOCK marks in connection with the sale of beverages. Polar has no adequate remedy at law to address all of the injuries that Defendants have caused and intend to cause by their conduct. Both a balancing of the equities and a consideration of the public's interest favor granting injunctive relief for Polar.

Plaintiff therefore respectfully requests this Court to preliminarily enjoin Defendants from continuing to infringe upon and otherwise profit from Polar's registered and incontestable trademark rights.

III. STATEMENT OF FACTS

The facts relevant to this motion are set forth in the Verified Complaint ("Cplt."), herein incorporated, submitted and attached as Exhibit A.

IV. ARGUMENT

A. PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION ENJOINING DEFENDANTS' UNAUTHORIZED USE OF POLAR

The legal standard is well established. As this Court has recognized, to obtain a preliminary injunction, a plaintiff must show: (1) a likelihood of success on the merits; (2) a risk of irreparable harm to the plaintiff if the injunction is not issued; (3) that the balance of equities favors an injunction; and (4) that the public's interest will not be adversely affected by the granting of the injunction. See, e.g., Commerce Bank & Trust Co. v. TD Banknorth, Inc., 554 F. Supp. 2d 77, 83 (D. Mass. 2008) (Saylor, J.); see also Nieves-Marquez v. Puerto-Rico, 353 F.3d 108, 120 (1st Cir. 2003). "The sine qua non of this four-part inquiry is likelihood of success on the merits." New Comm. Wireless Servs. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002). This is particularly true when the movant seeks a preliminary injunction on the basis of a trademark claim, since irreparable harm generally follows from infringement and the resolution of the other factors will depend upon likelihood of establishing infringement. See Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir. 2006); I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir. 1998). "[A]s a matter of public policy, trademarks should be protected against infringing uses . . . ." Borinquen Biscuit Corp., 443 F.3d at 115.

Plaintiff's request for a preliminary injunction is premised on the Lanham Act which protects registered trademarks, such as Plaintiff's POLAR mark. The Lanham Act expressly provides that the federal courts may enjoin infringing activities. See 15 U.S.C. § 1116.

1. Plaintiff Has A Reasonable Likelihood Of Succeeding On The Merits Of Its Federal Trademark Infringement Claim Under The Lanham Act

In order for Plaintiff to prevail on its claim of trademark infringement, it must show that: (1) Plaintiff owns a valid mark; and (2) Defendants' use of a similar name or mark is likely to confuse the consumer. See Star Fin. Servs., Inc. v. AASTAR Mort. Corp., 89 F.3d 5, 9 (1st Cir. 1996) (citations omitted). Plaintiff easily demonstrates a likelihood of confusion arising from Defendants' use of confusingly similar names and marks for POLAR and the POLAR SHOCK family of marks for the same or similar types of beverages targeted to the same consumers.

a. POLAR is a Valid Mark

Polar has owned and used the trademark POLAR since 1902 in connection with the sale of its beverages, including carbonated soft drinks, bottled water, seltzer water and other beverages. Cplt. ¶¶ 12, 17. Polar also owns the U.S. Trademark Registrations for Reg. Nos. 0084705, 1177537 and 2743648. Cplt. ¶¶ 14, 16 and Exhibits 1-3. The POLAR Registered Mark has a priority date that long predates Defendants' first use, which began in 2010, or any other date upon which Defendants may rely. In addition, Polar has an application pending for the POLAR mark shown in the Application Ser. No. 85/066,438. Cplt. ¶ 14 and Exhibit 4. This application, which was filed prior to any date upon which Defendants may rely, has survived the opposition period without incident in the United States Patent and Trademark Office and the registration is expected to issue in the near future. Cplt. ¶¶ 14, 113.

When a party seeks protection for a registered trademark, its burdens are lighter. Registration is "prima facie evidence of the validity of the registered mark." 15 U.S.C. § 1115(a); Borinquen Biscuit Corp., 443 F.3d at 115; Quabaug Rubber Co. v. Fabiano Shoe Co., 567 F.2d 154, 161 n.12 (1st Cir. 1977) (explaining that "registration is prima facie evidence that the . . . mark is distinctive per se"). The holder of a registered mark is entitled to a presumption that its mark is *distinctive*, i.e. strong. See 15 U.S.C. § 1115(a); Borinquen Biscuit Corp., 443 F.3d at 120. If the registered mark has become incontestable through the owner's compliance with the applicable statutory formalities, as is the case here, the presumption is conclusive. See 15 U.S.C. § 1115(b); Borinquen Biscuit Corp., 443 F.3d at 115.

In accordance with Sections 7(b), 22 and 33(a) of the Lanham Trademark Act, Plaintiff's POLAR registrations constitute *prima facie* evidence of the validity of the registered marks and of the registration thereof, Plaintiff's ownership of the marks shown in said registration and Plaintiff's *exclusive* right to use the mark in commerce in connection with the goods and services named therein, without condition or limitation. Cplt. ¶ 16. In addition, since 1902, Plaintiff has owned and consistently and substantially used the trademark POLAR in interstate commerce throughout New England and New York. Cplt. ¶¶ 12, 17-20. More broadly, in Massachusetts, Connecticut, Maine, New Hampshire, Vermont, New York, Ohio, Pennsylvania, Rhode Island, North and South Carolina, Virginia, Tennessee, Minnesota, Maryland, Delaware, New Jersey, Florida and South Dakota, Polar has used in interstate commerce the trademark POLAR since a date prior to any date upon which Defendants may rely. Cplt. ¶¶ 7, 15, 30 & 51. This also establishes Plaintiff's valid, incontestable mark. See Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 26-27 (1st Cir. 1989); Boxcar Media, LLC v. RedneckJunk, LLC, 345 F. Supp. 2d 76, 79 (D. Mass. 2004) (noting that trademark protection is acquired at both state and federal levels solely by use of the mark in commerce).

Based on the foregoing, Plaintiff owns a valid, incontestable, strong mark.

b. There is a Likelihood of Confusion

The purpose of trademark law is "to prevent one seller from using the same 'mark' as – or one similar to – that used by another in such a way that he confuses the public about who really produced the goods." Star Fin. Servs., Inc., 89 F.3d at 8 (citations omitted). Consumer confusion may "jeopardize the commercial reputation of the senior (first) user, which might be tarnished by association with the junior (subsequent) user." See Dialogo, LLC v. Santiago Bauza, 467 F. Supp. 2d 115, 126 (D. Mass 2006) (quoting DeCosta v. Viacom Int'l, Inc., 981 F.2d 602, 605 (1st Cir. 1992)). This is equally true in the context of a so-called "reverse confusion" where a large or well-established junior user enters a market and threatens to overwhelm a smaller, more senior user. See, e.g., Commerce Bank & Trust Co., 554 F. Supp. 2d at 83 (citing Attrezzi, LLC v. Maytag Corp., 436 F.3d 32 (1st Cir. 2006)) (explaining that same principles of trademark confusion apply where more junior user of a mark is a large, well-established corporation).

Once the validity of a mark is established, the test for infringement is the likelihood of consumer confusion. In determining whether a mark presents a likelihood of confusion with another mark, the Court must consider each of the following eight factors:

> (1) the similarity of the marks;
> (2) the similarity of the goods;
> (3) the relationship between the parties' channels of trade;
> (4) the relationship between the parties' advertising;
> (5) the classes of prospective purchasers;
> (6) evidence of actual confusion;
> (7) the defendant's intent in adopting its mark; and
> (8) the strength of the plaintiff's mark.

Borinquen Biscuit Corp., 443 F.3d at 120 (citing Astra Pharm. Prods., Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 1205 (1st Cir. 1983)); see also Commerce Bank & Trust Co., 554 F. Supp. 2d at 85; Best Flavors, Inc. v. Mystic River Brewing Co., 886 F. Supp. 908, 912 (D. Maine 1995) (finding a likelihood of confusion and issuing an injunction for non-alcoholic beverages branded with plaintiff's ROYAL MISTIC and MISTIC marks on the one hand and defendant's MYSTIC SEAPORT on the other). No singular factor is determinative; rather all factors must be evaluated in context and considering the circumstances in which the ordinary consumer will confront the conflicting mark. See Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 817 (1st Cir. 1987).

The likelihood of confusion generated by the Defendants' use of the POLAR SHOCK family of marks, long after Plaintiff's first use, marketing and registration of POLAR for a variety of beverages, is readily established under this eight-factor test. Cplt. ¶¶ 14-17; 41-46; 50-51; 55 & 76. Confusion is especially likely in light of the facts that: (1) PepsiCo's marks completely incorporate Plaintiff's registered mark POLAR (Cplt. ¶¶ 13-18 and Exhibits 1-4; 44-46 and Exhibits 9-18; 54-59); (2) PepsiCo's marks and Polar's mark cover the same category of beverage products within Class 32 (Cplt. ¶¶ 59; 81-82; 88-89); (3) PepsiCo and Polar sell their beverage products to the same or overlapping demographic of customers (Cplt. ¶¶ 60; 86-88); (4) Both PepsiCo and Polar's beverages are sold in the same channels of commerce (Cplt. ¶¶ 37; 84-85; 89); and (5) PepsiCo's use of Mountain Dew SHOCK and Polar SHOCK suggests an intent to springboard off the famous marks Mountain Dew and Polar. Cplt. ¶¶ 67-78; 90.

(1) Plaintiff's POLAR trademark and Defendants' POLAR SHOCK Family of Marks Are Virtually Identical

Since 1902, Polar has owned and used in interstate commerce the trademark POLAR for beverages in Class 32, including carbonated soft drinks, non-carbonated water, seltzer water, iced teas, and fruit juice and seltzer water blended beverages. Cplt. ¶¶ 12-14; 17; 21 & Exhibit 5. Plaintiff owns the incontestable trademark Registrations on the Principal Register for U.S. Reg. Nos. 0084705 (POLAR), 1177537 (POLAR PURE) and 2743648 (POLAR and Design). Cplt. ¶¶ 13-14. Plaintiff also owns the allowed Application Ser. No. 85/066438 (POLAR), which Application will mature into a Registration in the near future. Cplt. ¶ 14. POLAR is either the sole element or the dominant component of each of Plaintiff's registered or applied for marks. Cplt. ¶¶ 13-14.

The degree of similarity between marks is determined by analyzing their sight, sound, and meaning. See Wheeler, 814 F.2d at 817. "[S]imilarity is determined on the basis of the total effect of the designation, rather than a comparison of individual features. . . ." Pignons S.A. de Mecanique de Precision v. Polaroid Corp., 657 F.2d 482, 487 (1st Cir.1981); see also I.P. Lund Trading ApS, 163 F.3d at 43. However, less weight is given to the generic [disclaimed] portions of the parties' respective, composite marks. See, e.g., Banff, Ltd. v. Federated Dep't Stores, Inc., 841 F.2d 486, 491 (2d Cir. 1988); 4 McCarthy, § 23:49 (noting that "[i]f a common portion of the two conflicting marks is a public domain generic name, the emphasis of enquiry should be upon the confusing similarity of the nongeneric portion, with the ultimate issue determined by the confusing similarity of the total impression of both marks"). Moreover, courts have routinely found that where parties use identical words in their marks, the specter of confusion is raised. See, e.g., Commerce Bank & Trust Co., 554 F. Supp. 2d at 85 (noting that the words "Commerce Bank" in the respective marks are "virtually identical" and enjoining defendant); Best Flavors, Inc., 886 F. Supp. at 914 (finding that non-alcoholic beverages sold under labels "MYSTIC SEAPORT" and "MISTIC" are confusingly similar and granting injunction).

Defendants' POLAR SHOCK family of marks is very similar to Polar's POLAR mark. Indeed, PepsiCo's mark "POLAR SHOCK" is virtually identical to Plaintiff's POLAR trademark, the only difference being the addition of the word "SHOCK." Cplt. ¶¶ 44-46; 53-59.[1] PepsiCo's POLAR SHOCK mark looks and sounds confusingly similar to Plaintiff's POLAR mark and wrongly suggests that Plaintiff is somehow manufacturing, promoting, selling or sponsoring the Defendants' frozen, sugary, slush-type product. Cplt. ¶ 55. Because the term "POLAR" is the first term in every one of The Concentrate Manufacturing Company of Ireland's applied-for marks, POLAR is the first word that will be read by consumers of the products identified by the marks. Cplt. ¶¶ 56-57. POLAR is the dominant feature of both Plaintiff's and Defendants' marks and is therefore inevitably an integral component in the commercial impression that each of the marks makes on such consumers. Cplt. ¶ 57. Thus, the commercial impression of every one of the POLAR SHOCK marks is very and confusingly similar to the commercial impression created by Polar's mark, POLAR. Cplt. ¶¶ 14; 44-46; 53-58. Each of the POLAR SHOCK marks so resembles Polar's previously used and registered POLAR marks and creates such a similar commercial impression to Polar's POLAR marks as to be likely, when

[1] The POLAR SHOCK family of infringing marks includes the following: (i) POLAR SHOCK; (ii) POLAR SHOCK ORANGE FROST; (iii) POLAR SHOCK RASBERRY BLUES; (iv) POLARSHOCK; (v) POLAR SHOCK; (vi) POLAR SHOCK SERIOUS STRAWBERRY; (vii) POLAR SHOCK POTENT PEACH; (viii) POLAR SHOCK VIVA MAGARITA; (ix) POLAR SHOCK CHILLA VANILLA; and (x) POLAR SHOCK MO MOCHA. Cplt. ¶¶ 44-46 and Exhibits 7-16.

applied to the beverages goods manufactured, distributed and sold by the Defendants, to cause confusion, mistake or deception. Cplt. ¶¶ 53-58; 76-78.

This factor of similarity of the marks weighs in favor of Plaintiff.

(2) Similarity of the Goods

An owner of a trademark is afforded "protection against use of its mark on any product or service which would reasonably be thought by the buying public to have come from the same source." Anheuser-Busch v. Caught-on-Bleu, 288 F. Supp. 2d 105, 118 (D.N.H. 2003), aff'd without op., 105 Fed. Appx. 285 (1st Cir. 2004), cert. denied, 544 U.S. 920 (2006); Calamari Fisheries, Inc. v. The Village Catch, Inc., 698 F. Supp. 994, 1010 (D. Mass 1988) (barring defendant's use of "The Village Catch" seafood restaurant as confusingly similar to plaintiff's "The Daily Catch" restaurant, which both provided similar goods and services).

In the case at bar, Plaintiff and Defendants are directly competing for the same consumer, each offering a non-alcoholic beverage product. Cplt. ¶ 59. Defendants' frozen, non-alcoholic, non-carbonated beverages are similar to and competitive with Polar's beverages. All of PepsiCo's POLAR SHOCK branded beverages are marketed and sold to the same or overlapping demographic profile of customers as Polar's beverages. Cplt. ¶¶ 60; 88-95 and Exhibits 26-27. These customers encounter both parties' goods in convenience stores, supermarkets, and at fountain services. Cplt. ¶¶ 18-19; 60. Indeed, as Judge Hornby found in Best Flavors regarding beverage similarities, "all chilled nonalcoholic beverages, other than perhaps milk, are closely related for many beverage purchasing decisions. The competition in the market is (to use the trade's term) for 'the beverage share of the belly.'" Best Flavors, 886 F. Supp. at 914; Cplt. ¶ 88; Exhibit 26.

Moreover, consumers of Polar's products and Defendants' POLAR SHOCK products are likely to make purchase decisions that rely on quick, impulse choices. Cplt. ¶¶ 86-87. The nature of those purchase decisions increases the likelihood of confusion when the consumers are confronted with the similarities between the POLAR and POLAR SHOCK marks. See, e.g., Best Flavors, 886 F. Supp. at 917 (noting the heightened risk of confusion where relatively inexpensive products are purchased quickly). Moreover, POLAR and POLAR SHOCK branded products are also sold through fountain dispensing machines in outlets in the food service industry, including in various restaurants throughout New York and New England. Cplt. ¶¶ 18-19; 59-60; 81-85.

Accordingly, there is little doubt that the parties' beverage products are related and this factor therefore also weighs in favor of Plaintiff.

(3), (4) & (5) The Parties' Channels of Trade, Advertising Methods and Class of Consumers are Identical

The relationship between the parties' channels of trade, the relationship between their advertising, and the classes of their prospective purchasers are normally considered together. See Beacon Mut. Ins. Co. v. OneBeacon Ins. Group, 376 F.3d 8, 19 (1st Cir. 2004).

Plaintiff and Defendants are directly competing entities, offer directly competing products and operate in overlapping channels of trade. Cplt. ¶¶ 36-37; 59-60; 83-88. Among other places, Plaintiff and Defendants both advertise their products on websites, television, radio and newspapers, and both parties' general advertising is directed to consumers in a wide-range of ages. Cplt. ¶¶ 18-24; 28-30; 34-41. Both Plaintiff and Defendants also advertise throughout New England, New York, and other overlapping geographic regions in the United States. Cplt. ¶¶ 7; 18-19; 41; 62 & 85.

In addition, Polar beverage products and Defendants' POLAR SHOCK beverage products are sold for similar prices and compete for the same consumer regarding that consumer's decision to purchase a beverage. Cplt. ¶ 88. In Best Flavors, the Court noted that with respect to the parties' sales, "the parties target different audiences but naturally seek not to foreclose others from buying and consuming their product. In fact, there will be substantial overlap." Best Flavors, 886 F. Supp. at 916. As in Best Flavors, here both PepsiCo's POLAR SHOCK products and Plaintiff's POLAR products compete for "the beverage share of the belly." Best Flavors, 886 F. Supp. at 914. Indeed, the targeted consumer for Plaintiff's and Defendants' products "ultimately is everyone with a mouth." Id. at 917. Furthermore, non-carbonated, non-alcoholic frozen flavored beverages and other beverages such as iced teas, water and carbonated beverages are often found in close proximity to each other in retail outlets that sell both frozen flavored beverages and other beverages. Cplt. ¶ 89.

As noted above, consumers of Polar's POLAR products and Defendants' POLAR SHOCK products make purchase decisions that likely rely on quick, impulse choices. Cplt. ¶¶ 86-88. Moreover, POLAR products and Defendants' POLAR SHOCK products are sold for similar, relatively inexpensive prices and compete for the same consumer regarding that consumer's decision to purchase a beverage. Cplt. ¶¶ 88-89. Both the POLAR mark and the POLAR SHOCK marks are used by their respective owners on cups, on beverage dispensers and in point of purchase materials in retail establishments. Cplt. ¶ 60. As the Best Flavors court noted, "[i]n this context, the court's so-called 'ordinarily prudent purchaser' does not stop to study labels but reaches for a quickly identifiable beverage. . . . I conclude, therefore, that the classes of purchasers overlap and cannot be segregated. . . ." Id. at 916; see also E. & J. Gallo

Winery v. Consorzio del Gallo Nero, 782 F. Supp. 457, 464-65 (N.D. Cal. 1991) (finding inexpensive wines bought on impulse purchase and making confusion more likely).

Accordingly, the factors of similarity of the parties' marketing, channels of trade and prospective consumers weigh in favor of Plaintiff.

(6) Actual Confusion

In order to prevail, a plaintiff does not have to show actual confusion; mere likelihood of confusion is sufficient. See Wheeler, 814 F.2d at 818. Here, Defendants have not yet begun extensive distribution of the POLAR SHOCK family of products and actual confusion should be stopped by the Court before it begins. See, e.g., Best Flavors, 886 F. Supp. at 916 (noting that actual confusion cannot be shown prior to actual distribution); Cplt. ¶ 49.

(7) Defendants' Intent

It is well established that good faith is not a defense to trademark infringement. Star Financial Services, Inc., 89 F.3d at 11 (citations omitted). The reason is clear: If potential purchasers are confused, no amount of good faith can make them less confused. While bad faith is not required to find a likelihood of confusion, evidence of a Defendant's bad faith is probative in finding a likelihood of confusion. See id. at 12.

In the present case, there is no doubt that the Defendants had both constructive and actual notice of Plaintiff's POLAR trademark well before Defendants chose the POLAR SHOCK marks. Plaintiff owned its United States Trademark Registrations prior to Defendants' first use of its marks. Cplt. ¶¶ 14-17; 51-52. Plaintiff's registrations are, in fact, constructive notice to the world of Plaintiff's trademark rights. See 15 U.S.C. § 1072.

Defendants' counsel also corresponded with Plaintiff's counsel concerning the POLAR and POLAR SHOCK marks. Cplt. ¶¶ 45-50. Moreover, there is an existing business relationship between PepsiCo and Polar which makes Defendants' knowledge of Polar's brand irrefutable. Cplt. ¶¶ 61-63. In addition, executives for PepsiCo and Polar have served together on professional boards and directly discussed the POLAR and POLAR SHOCK marks. Cplt. ¶¶ 64-65. Thus, it is undisputed that Defendants had both actual and constructive knowledge of Plaintiff's trademark rights, yet, notwithstanding Defendants' actual knowledge, they knowingly incorporated Plaintiff's house mark into their POLAR SHOCK marks. Cplt. ¶¶ 50-52; 66. A presumption of bad faith may arise, where, as here, the infringer adopts a mark with knowledge of the Plaintiff's mark for competing goods in the same market, sold to indiscriminate or unsophisticated purchasers. See R.J. Toomey Co. v. Toomey, 683 F. Supp. 873, 877-78 (D. Mass. 1998).

Defendants knowingly and intentionally entered at least the Massachusetts market and, upon information and belief, intend to enter the market throughout the United States, offering a beverage product in connection with marks nearly identical to that of Plaintiff's, an established and successful enterprise. Cplt. ¶¶ 40-41; 49. Worse still, Defendants already own and use the "SHOCK" mark in connection with their MOUTAIN DEW / MTN DEW brands. Cplt. ¶¶ 35; 67-78. Defendants are of course free to combine their own famous brands with the term SHOCK, but PepsiCo cannot misappropriate the famous Polar brand for POLAR SHOCK. Cplt. ¶ 77. Defendants clearly acted with knowledge of Plaintiff's trademark rights – which Plaintiff's have owned for over 100 years – and of Plaintiff's federal trademark registrations, and with the intention of suggesting an association, affiliation or sponsorship with the well-known and well-regarded POLAR products.

(8) Strength of Plaintiff's Mark

The final factor to be considered in the consumer-confusion analysis is the strength of the Plaintiff's mark. Plaintiff owns incontestable Registrations on the Principal Register for Trademark Reg. Nos. 0084705 (POLAR), 1177537 (POLAR PURE) and 2743648 (POLAR and Design), and Plaintiff owns the allowed Application Ser. No. 85066438 for POLAR. Cplt. ¶¶ 13-17. Registration of a mark is considered "prima facie evidence of the validity of the registered mark," and the holder is entitled to a presumption that its marks are *distinctive,* i.e. strong. See 15 U.S.C. § 1115(a); Borinquen Biscuit Corp., 443 F.3d at 120; Quabaug Rubber Co., 567 F.2d at 161 n.12; Perfection Fence Corp. v. Fiber Composites, LLC, 2005 U.S. Dist. LEXIS 2157, at *13-*14 (D. Mass. Feb. 10, 2005) (noting that while the mark PERFECTION FENCE is laudatory and descriptive, registration entitles it to presumption of strength for likelihood of confusion purposes); Cplt. ¶ 16. This presumption of distinctiveness can not be rebutted with evidence of descriptiveness once the mark becomes incontestable. See 15 U.S.C. § 1115(b); Borinquen Biscuit Corp., 443 F.3d at 115.

Moreover, Plaintiff has owned and substantially and consistently used in interstate commerce the POLAR trademark since at least 1902. Cplt. ¶¶ 12-14; 17; see Boxcar Media, LLC, 345 F. Supp. 2d at 79 (noting that use of a trademark in commerce is the critical factor in acquiring trademark rights). Plaintiff thus owns an indisputably distinctive mark, by virtue of its incontestable status as a federally registered trademark, and it has owned and used that trademark in relation to non-alcoholic beverages for over 100 years. Cplt. ¶¶ 12-14; 17.

Therefore, this factor also weighs in Plaintiff's favor and gives Polar's POLAR marks the wide berth of protection granted by the Lanham Act to prohibit others from trading upon the goodwill that has been built in the mark by the Plaintiff.

(9) Conclusion

The confusion factors weigh heavily in Plaintiff's favor. Plaintiff owns a protectable mark and Defendants' unauthorized use of POLAR SHOCK is likely to cause confusion. Therefore, Plaintiff has demonstrated a likelihood of success on the merits. See Commerce Bank & Trust Co., 554 F. Supp. 2d at 87.

2. The Plaintiff is Suffering Irreparable Harm

Once Plaintiff establishes a likelihood of succeeding on the merits of its trademark infringement claim, irreparable injury is presumed as a matter of law. See id. at 87; see also Camel Hair & Cashmere Inst. v. Assoc. Dry Goods Corp., 799 F.2d 6, 14-15 (1st Cir. 1986); Perfumanía, Inc. v. Perfulandia, Inc., 279 F. Supp. 2d 86, 103-04 (D.P.R. 2003) (noting that "[b]y its very nature, trademark infringement results in irreparable harm because the attendant loss of profits, goodwill and reputation cannot be satisfactorily quantified") (quotation omitted). Plaintiff has demonstrated a likelihood of success on its claim. Therefore, Plaintiff is entitled to injunctive relief.

Even without the presumption, however, Polar is suffering irreparable harm. Irreparable injury occurs to a trademark owner when it has lost control of its reputation and goodwill by another's use of a confusingly similar name or mark. See McNeil-PPC, Inc. v. Merisant Co., 2004 U.S. Dist. LEXIS 27733, at *67, *73-*74 (D.P.R. July 29, 2004). Plaintiff faces irreparable damage to its own goodwill and reputation associated with the POLAR trademark should Defendants provide inferior products. Cplt. ¶¶ 96-99. Plaintiff cannot control the quality or public perception of Defendants' products. Cplt. ¶¶ 93-95. Moreover, PepsiCo's POLAR SHOCK products are sugary, slush-type products, and Plaintiff has emphasized in the past the good quality, healthy nature of its products, as evidenced by Plaintiff's entire FIZZICALLY FIT campaign in the summer of 2010. Cplt. ¶¶ 25-30; 95-96 and Exhibits 27-28.

Money damages cannot wholly compensate Plaintiff for its injuries because the injuries involve incalculable harm to Plaintiff's goodwill, reputation and relationship with present and prospective customers. Irreparable harm to Plaintiff exists.

3. The Balance of Hardships Weighs In Favor of Plaintiff

In weighing the balance of harms resulting from the granting or denial of a preliminary injunction in a trademark infringement case, it is generally true that the "harm to the defendant flowing from an injunction where infringement appears likely is entitled to less consideration than other harms." See Commerce Bank & Trust Co., 554 F. Supp. 2d at 88. Plaintiff here has demonstrated a likelihood of consumer confusion, and that showing "is enough to place the weight of public interest concerns in favor of granting the injunction." See Boustany v. Boston Dental Group, Inc., 42 F. Supp. 2d 100, 113 (D. Mass. 1999).

Defendants cannot complain that they will suffer irreparable injury if a Preliminary Injunction is issued because they misappropriated Plaintiff's POLAR mark with full knowledge of the trademark rights of Plaintiff. Even if Defendants complain that they will be harmed if Plaintiff's requested injunctive relief is granted, any harm Defendants could conceivably sustain is far outweighed by the harm to Plaintiff if Plaintiff's requested relief is denied. In balancing hardships, courts generally place little weight on injuries that parties bring upon themselves through blatant misconduct. See Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc., 143 F.3d 800, 806 (3d Cir. 1998) (recognizing that "[t]he self-inflicted nature of any harm suffered by [trademark infringer] also weighs in favor of granting preliminary injunctive relief"). The balance of hardships favors Plaintiff.

4. An Injunction Will Serve The Public Interest

Consumer confusion is contrary to the public interest. See Telerep Caribe, Inc. v. Zambrano, 146 F. Supp. 2d 134, 146 (D.P.R. 2001). In trademark cases, the public interest almost always favors the granting of otherwise “appropriate injunctions.” See Boustany, 42 F. Supp. 2d at 113 (citations omitted).

Plaintiff has demonstrated likelihood of success on the merits of its claims and irreparable injury. The public will undoubtedly be harmed if Defendants are permitted to continue to deceive or confuse the public as to the origin or sponsorship of their POLAR SHOCK products. The issuance of an injunction will protect the public from the deceptive and confusing use of Plaintiff’s POLAR registered trademark.

V. CONCLUSION

For the reasons discussed above and as set forth in the Verified Complaint, this Court should grant Plaintiff's Motion for a Preliminary Injunction. Plaintiff respectfully requests that:

Defendants and their respective agents, servants, employees, officers, directors, successors, licensees and assigns, and all those in active concert or participation with them, be preliminarily enjoined from:

(a) using in any form or manner (i) POLAR SHOCK; (ii) POLAR SHOCK ORANGE FROST; (iii) POLAR SHOCK RASBERRY BLUES; (iv) POLARSHOCK; (v) POLAR SHOCK; (vi) POLAR SHOCK SERIOUS STRAWBERRY; (vii) POLAR SHOCK POTENT PEACH; (viii) POLAR SHOCK VIVA MAGARITA; (ix) POLAR SHOCK CHILLA VANILLA; (x) POLAR SHOCK MO MOCHA or any confusingly similar trademark, trade name, domain name, email address or internet search keywords or advertisement word anywhere in the United States;

(b) engaging in any conduct which will cause or is likely to cause confusion, mistake or misunderstanding as to the source, affiliation, connection, or association of Defendants or Defendants' products, promotions, sales or advertisements with Polar or Polar's products, promotions, sales or advertisements; and

(c) otherwise infringing upon Polar's trademark rights or unfairly competing with Polar in any manner whatsoever.

Respectfully submitted,

POLAR CORP.

/s/ Mark D. Meredith

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